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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BESHARA ELMASRY,

Plaintiff,

vs.

WESTERN REFINING RETAIL, LLC, a
Delaware Limited Liability Company; 7-
ELEVEN, INC., a Texas Corporation;
SPEEDWAY, LLC, a Delaware Limited
Liability Company; and DOES 1 to 20,
inclusive,

Defendants.

Case No. 8-22-cv-1031

**DEFENDANTS' NOTICE OF
REMOVAL OF ACTION PURSUANT
TO 28 U.S.C. §§ 1332 AND 1441**

Complaint Filed: XXX
Trial Date: None Set

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EST. 1981

**TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA:**

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332(a), 1441(a) and (b), and 1446, Defendants Western Refining Retail, LLC (“Western”), 7-Eleven, Inc. (“7-Eleven”), and Speedway, LLC (“Speedway”) (collectively referred to as “Defendants”) remove to the United States District Court for the Central District of California, the state court action described below. In accordance with 28 U.S.C. § 1446(a), Defendants submit the following short, plain statement of the grounds for removal.

I. STATEMENT OF JURISDICTION

1. This Court has original jurisdiction over this action under the diversity of citizenship statute. 28 U.S.C. § 1332(a). In relevant part, the diversity statute grants district courts original jurisdiction over civil actions where the matter in controversy exceeds \$75,000, exclusive of interest and costs, it is a civil action between citizens of different states, and no defendant is a citizen of the State of California. As set forth below, this case meets all of the diversity statute’s requirements for removal and is timely and properly removed by the filing of this Notice.

II. VENUE

2. This action was filed in Orange County Superior Court. Venue properly lies in the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 84(c), and 141(a) and 1446(a).

III. PLEADINGS, PROCESS AND ORDERS

3. On April 19, 2022, Plaintiff Beshara Elmasry (“Plaintiff”) filed a Complaint in Orange County Superior Court naming each of the defendants as a defendant and alleging thirteen causes of action: for disability discrimination,

1 retaliation, and other claims under the California Fair Employment and Housing Act
 2 (“FEHA”); tort claims of wrongful termination in violation of public policy, negligent
 3 as well as intentional infliction of emotional distress, and negligent supervision; a claim
 4 under the California Business & Professions Code; and wage claims under the
 5 California Labor Code including failure to pay all wages due, meal and rest break
 6 violations, as well as wage statement violations under the California Labor Code. The
 7 Complaint is titled *Beshara Elmasry v. Western Refining Retail, LLC, et al.*, and
 8 designated Orange County Superior Court Case No. 30-2022-01255357-CU-WT-WJC.
 9 A true and correct copy of the Summons and Complaint has been attached to the
 10 Declaration of Mireya A.R. Llaurodo submitted herewith (“Llaurodo Decl.”) as **Exhibit**
 11 **1** (“Complaint”).

12 4. On April 20, 2022, Plaintiff served on Defendants 7-Eleven, Inc. and
 13 Speedway, LLC, through Defendants’ agent for service of process: (1) the Summons
 14 and Complaint; (2) a Civil Case Cover Sheet; and (3) Notice of Hearing. On April 21,
 15 2022, Plaintiff served Defendant Western Refining Retail, LLC, through Defendant’s
 16 agent for service of process: (1) the Summons and Complaint; (2) a Civil Case Cover
 17 Sheet; and (3) Notice of Hearing. True and correct copies of these documents are
 18 attached to the Llaurodo Decl. as **Exhibits 1 and 2**.

19 5. On May 19, 2022, Defendants filed their Answer to the Complaint in State
 20 Court and served a copy of the Answer on Plaintiff. A true and correct copy of the
 21 Answer is attached to the Llaurodo Decl. as **Exhibit 3**.

22 6. As of the date of this Notice of Removal, no other parties have been named
 23 or served with the Summons and Complaint in this action. Llaurodo Decl., ¶ 5.

24 7. The documents attached to the Llaurodo Declaration as Exhibits 1 - 3
 25 constitute all of the pleadings and process that have been filed or received by
 26 Defendants in this action. The attachments satisfy the requirements of 28 U.S.C. section
 27 1446(a). To Defendants’ knowledge, no further process, pleadings, or orders related to
 28

1 this case have been filed in the Orange County Superior Court or served by any party
2 other than as described above. *See* Llauro Decl., ¶ 6.

3 4 **IV. TIMELINESS OF REMOVAL**

5 8. This Notice of Removal is timely as it is filed within thirty (30) days of
6 April 20, 2022, the date of service of the Summons and Complaint, and within one year
7 from the commencement of this action. *See* 28 U.S.C. § 1446(b). No court proceedings
8 have taken place.

9 10 **V. DIVERSITY JURISDICTION**

11 9. The diversity of citizenship statute, 28 U.S.C. § 1332(a), provides in
12 relevant part:

13 The district courts shall have original jurisdiction of all civil
14 actions where the matter in controversy exceeds the sum or
15 value of \$75,000, exclusive of interest and costs, and is
16 between –
(1) citizens of different States. . .

17 10. This action is a civil action over which this Court has original jurisdiction
18 based on diversity of citizenship pursuant to 28 U.S.C. § 1332(a), and is one which may
19 be removed to this Court by Defendants pursuant to 28 U.S.C. § 1441(b) because it is a
20 civil action between citizens of different states and the amount in controversy exceeds
21 \$75,000, exclusive of interest and costs, as set forth below.

22 **A. Diversity of Citizenship**

23 11. To establish citizenship for diversity purposes, a natural person must be
24 both a citizen of the United States and a domiciliary of a particular state. *Kantor v.*
25 *Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983). An individual is a
26 citizen of any state where he or she is domiciled at the time the lawsuit is filed. *Id.*
27 Residency, though not the equivalent of domicile, can create a rebuttable presumption
28 of domicile supporting diversity of citizenship. *See Lew v. Moss*, 797 F.2d 747, 751 (9th

1 Cir. 1986); *see also State Farm Mut. Auto Ins. Co. v. Dyer*, 19 F.3d 514, 520 (10th Cir.
 2 1994) (a party's residence is *prima facie* evidence of domicile for purposes of
 3 determining citizenship).

4 12. Plaintiff's Complaint (at paragraph 1) alleges he "is, and was, at all
 5 relevant times mentioned in this Complaint residing within the County of Orange, State
 6 of California." *See* Llauro Decl., Ex. 1. As to his employment, Plaintiff acknowledges
 7 that he began working at "a Convenience Store . . . which is located at the county of
 8 Orange, the State of California" in December 2018. *See* Llauro Decl., Ex. 1
 9 (Complaint ¶¶ 16-17). The Complaint further acknowledges that Plaintiff was working
 10 in "Irvine, California" in the days leading up to his termination on November 23, 2021.
 11 *See* Llauro Decl., Ex. 1 (Complaint ¶¶ 30, 41). Pay documentation pertaining to
 12 Plaintiff confirms an address for Plaintiff, as of December 31, 2020, in California (city
 13 of Anaheim). Declaration of Susan Hager ¶ 9, Ex. 1 (May 19, 2022) ("Hager Decl.").
 14 Thus, Plaintiff is a citizen of California for diversity jurisdiction purposes. *See Kyung*
 15 *Park v. Holder*, 572 F.3d 619, 624–25 (9th Cir.2009) ("The intention to remain may be
 16 established by factors such as: current residence; voting registration and practices;
 17 location of personal and real property; location of brokerage and bank accounts;
 18 location of spouse and family; membership in unions and other organizations; place of
 19 employment or business; driver's license and automobile registration; and payment of
 20 taxes," citing *Lew*, 797 F.2d at 750)).

21 13. For diversity jurisdiction purposes, a corporation is deemed a citizen of its
 22 state of incorporation and the state where it has its principal place of business. 28
 23 U.S.C. § 1332(c)(1). At the time this action was commenced in state court:

- 24 • Defendant Western was and still is a limited liability company formed under the
 25 laws of the State of Delaware.
- 26 • Defendant 7-Eleven was and still is a corporation organized under the laws of the
 27 State of Texas.

- Defendant Speedway was and still is a limited liability company formed under the laws of the State of Delaware.

See Declaration of Kimberly Duncan (“Duncan Decl.”) ¶¶ 3-5 (May 18, 2022). In addition, as to each Defendant, the principal place of business and headquarters where its officers direct, control, and coordinate its activities, is as follows:

- Defendant Western – Ohio
- Defendant 7-Eleven – Texas
- Defendant Speedway – Ohio.

See Duncan Decl. ¶ 5. See *Hertz Corp. v. Friend*, 559 U.S. 77, 78 (2010) (the principal place of business is “where a corporation’s officers direct, control, and coordinate the corporation’s activities”). Thus, each Defendant is a citizen of a state other than California.

14. No other party has been named or served as of the date of this removal. The presence of Doe defendants in this case has no bearing on diversity with respect to removal. See 28 U.S.C. § 1441(a) (“[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded”).

15. Thus, as set forth above, Plaintiff is a citizen of California, and Defendants are citizens of other states as follows: Western – Delaware, Ohio; 7-Eleven – Texas; Speedway – Delaware, Ohio. Accordingly, the minimal diversity requirement of 28 U.S.C. § 1332(d)(2)(a) is satisfied.

B. The Amount in Controversy Exceeds \$75,000

16. This Court has jurisdiction over this case because the amount placed in controversy by Plaintiff’s alleged claims exceeds \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a).

17. In his Prayer for Relief, Plaintiff requests the following payments from Defendants:

1. All special damages, including past, present and future loss of earnings, and loss of earning capacity according to proof;

2. General damages for emotional distress and mental anguish in a sum according to proof;
3. For all actual, consequential, and incidental losses and damages, according to proof;
4. For pre-judgment interest to the extent permitted by law and reasonable attorneys' fees pursuant to Business & Professions Code § 1021.5.
5. That Defendants be found to have engaged in unfair competition in violation of Section 17200 et seq., of the California Business and Professions Code;
6. That Defendants be enjoined to cease and desist from committing further acts of unfair competition under section 17200 et seq. of the California Business and Professions Code and from continuing an unlawful course of conduct alleged herein;
7. For attorneys' fees, interests and costs of suit under Labor Code sections 1194, 218.5, 218.6 and 2802.
8. For punitive and exemplary damages in a sum appropriate to punish Defendants.
9. For such other relief and further relief as the Court deems just and proper.

See Llaurado Decl., Ex. 1 (Complaint at pages 26-27, Prayer for Relief.)

18. In measuring the amount in controversy, a court must assume that the allegations of the complaint are true and that a jury will return a verdict for the plaintiff on all claims made in the complaint. *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). The ultimate inquiry is what amount is put "in controversy" by the plaintiff's complaint, not what a defendant will actually owe. *Rippee v. Boston Mkt. Corp.*, 408 F. Supp. 2d 982, 986 (S.D. Cal. 2005).

19. If, as here, a plaintiff's state court complaint is silent as to the amount of damages claimed, the removing defendant need only establish that it is more probable than not that plaintiff's claim exceeds the jurisdictional minimum. *Sanchez v. Monumental Life Ins. Co.*, 95 F.3d 856, 860-861 (9th Cir. 1996), *amended by, reh'g en banc denied by*, 102 F.3d 398 (9th Cir. Cal. 1996). In an action by a single plaintiff against a single defendant, all claims can be aggregated to meet the minimum jurisdictional amount. *Bank of California Nat'l Assn. v. Twin Harbors Lumber Co.*, 465 F.2d 489, 491 (9th Cir. Cal. 1972); *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. Pa. 1993) ("the amount in

1 controversy is not measured by the low end of an open-ended claim, but rather by
2 reasonable reading of the value of the rights being litigated”).

3 20. In determining whether the amount in controversy exceeds \$75,000.00, the
4 Court must presume Plaintiff will prevail on every one of his claims. *Kenneth*
5 *Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F. Supp. 993, 1001 (C.D. Cal.
6 2002) (citing *Burns v. Windsor Ins. Co.*, 31 F. 3d 1092, 1096 (11th Cir. 1994) (the
7 amount in controversy analysis presumes that “plaintiff prevails on liability”) and
8 *Angus v. Shiley Inc.*, 989 F. 2d 142, 146 (3d Cir. 1993) (“the amount in controversy is
9 not measured by the low end of an open-ended claim, but rather by a reasonable reading
10 of the value of the rights being litigated”). The argument and facts set forth may
11 appropriately be considered in determining whether the jurisdictional amount in
12 controversy is satisfied. *Cohn v. Petsmart, Inc.*, 281 F. 3d 837, 843, n.1 (9th Cir. 2002)
13 (citing *Willingham v. Morgan*, 395 U.S. 402, 407, n.3 (1969)).

14 21. The amount in controversy may include general and special compensatory
15 damages and attorneys’ fees which are recoverable by statute. *Galt G/S v. JSS*
16 *Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). In determining whether a
17 Complaint meets the amount in controversy requirement, attorneys’ fees are to be
18 included. *See, e.g., Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700 (9th Cir.
19 2007); *Jasso v. Money Mart Express, Inc.*, Civil Action No. 11-CV-5500 YGR, 2012
20 WL 699465 (N.D. Calif. March 1, 2012).

21 22. Reviewing the Complaint’s Prayer for Relief, set forth in Paragraph 17,
22 *supra*, Plaintiff’s Prayer for Relief (at paragraph 1) seeks “past, present and future loss
23 of earnings,” among many other categories of damages. *See* Llauro Decl., Ex. 1. In
24 2020, which was the last full calendar year of Plaintiff’s employment, Plaintiff earned
25 \$42,993.06. Hager Decl. ¶ 9, Ex. 1. Based on a review of Plaintiff’s hourly rate and
26 average earnings as of his November 2021 termination and assuming a trial date of
27 approximately one year from removal (i.e., anticipated as June 1, 2023), Plaintiff’s total
28 lost wages, on their own, would readily amount to **\$76,049.35**. Hager Decl. ¶ 10, Ex. 2;

1 Llaurado Decl. ¶ 7. With his lost earnings alone, Defendants are well on their way in
2 establishing that the amount in controversy exceeds the \$75,000 threshold.

3 23. Reviewing the Complaint's Prayer for Relief, set forth in Paragraph 17,
4 *supra*, Plaintiff's Prayer for Relief (at paragraph 9) seeks "such other relief . . . as the
5 Court deems just and proper" and the Complaint's Eleventh Cause of Action at
6 paragraphs 132 and 133 specifically quotes California Labor Code section 203(a) in
7 alleging that Defendants owe Plaintiff additional amounts:

8 If an employer willfully fails to pay . . . any wages of an
9 employee who is discharged or who quits, the wages of the
10 employee shall continue as a penalty from the due date thereof
11 at the same rate until paid or until an action therefor is
commenced; but the wages shall not continue for more than 30
days.

12 *See* Llaurado Decl., Ex. 1. As set forth in the Plaintiff's pay records attached to the
13 Hager Declaration, in 2021, Plaintiff routinely worked overtime in the last three months
14 leading to his termination, and his hourly rate at termination was \$16.32. *See* Hager
15 Decl. ¶ 10, Exh. 2. Therefore, under California Labor Code section 203(a) referenced
16 by Plaintiff, the additional amount disputedly due to Plaintiff is **\$3,916.80**. *See* Llaurado
17 Decl. ¶ 8. Combined with his alleged lost earnings set forth above, the amount in
18 controversy plainly exceeds the \$75,000 threshold.

19 24. Plaintiff's Complaint (at paragraph 21) makes multiple allegations about
20 violations of California meal and rest break laws. For example, Plaintiff asserts he was
21 "regularly required to work in excess of four (4) hours without being provided a rest
22 period. Defendants neither permitted nor authorized PLAINTIFF to take lawful meal
23 and rest periods." *See* Llaurado Decl., Ex. 1. As to meal breaks specifically, the
24 Complaint (at paragraph 26) asserts Plaintiff was "regularly required to work in excess
25 of five (5) and/or ten (10) hours per day, without being provided meal periods as
26 mandated under the California Labor Code and the implementing rules and regulations
27 of the IWC Wage Orders." *Id.* In fact, the Complaint (at paragraph 142) goes so far as
28

1 to allege that “Defendants have a policy of refusing to provide employees like the
2 Plaintiff herein with legally required meal and rest periods.” *Id.*

3 25. Where a plaintiff’s complaint provides minimal evidence of the frequency
4 of alleged violations (i.e., alleging violations were part of a “pattern and practice” or
5 “matter of policy”), California district courts have found estimated violation rates of
6 60% reasonable and conservative for purposes of calculating the amount in controversy.
7 *See, e.g., Bryant v. NCR Corp.*, 284 F. Supp. 3d 1147, 1151 (S.D. Cal. 2018) (finding
8 defendant’s estimate of a 60% violation rate “reasonable” and “conservative[.]”); *Feao*
9 *v. UFP Riverside, LLC*, 2017 WL 2836207, at *4 (C.D. Cal. June 29, 2017) (same);
10 *Alvarez v. Office Depot, Inc.*, 2017 WL 5952181, at *3 (C.D. Cal. Nov. 30, 2017)
11 (same); *Stanley v. distribution Alternatives, Inc.*, 2017 WL 6209822, at *2 (C.D. Cal.
12 Dec. 7, 2017) (same).

13 26. The Complaint (at paragraph 137) explains: “When an employer fails to
14 provide such meal period, the employer is required to pay the employee as wages one
15 additional hour of pay at the employee’s regular rate of compensation.” *See* Llaurodo
16 Decl., Ex. 1. In the case of *Murphy v. Cole*, 40 Cal.4th 1094, (2007), the California
17 Supreme Court held that the remedy for meal and rest period violations of “one
18 additional hour of pay” under Labor Code section 226.7 is a wage subject to a three-
19 year statute of limitations. Following *Murphy* and counting (despite Plaintiff’s
20 allegations of widespread violations) just a **single** violation per week of a meal period
21 and just a **single** violation per week of a rest period since the start of Plaintiff’s
22 employment in December 2018, the additional amount at issue for those would be
23 **\$4,765.44**. *See* Llaurodo Decl. ¶ 10. This is a conservative estimate in light of Plaintiff’s
24 allegation (Complaint paragraph 142) that Defendants in fact had a blanket “policy of
25 refusing to provide employees” with either compliant meal or rest periods.

26 27. Considering just the alleged \$76,049.35 in disputed lost wages, the
27 \$3,916.80 allegedly due for wage waiting time violations under California Labor Code
28 section 203, and the \$4,765.44 allegedly due for meal and rest break violations, the

1 amount in controversy is conservatively estimated to be **\$84,731.59**. *See* Llaurado Decl.
 2 ¶ 11. This does not include the many other elements of damages raised by the
 3 Complaint's thirteen causes of action.

4 28. As set forth in Paragraph 17, *supra*, in Plaintiff's Prayer for Relief (at
 5 paragraph 8), Plaintiff also seeks recovery of punitive damages. Punitive damages are
 6 also included in calculating the amount in controversy. *Davenport v. Mutual Ben.*
 7 *Health & Acc. Ass'n*, 325 F. 2d 785, 787 (9th Cir. 1963); *see also Aucina v. Amoco Oil*
 8 *Co.*, 871 F. Supp. 332 (S.D. Iowa 1994). Although Defendants vigorously deny
 9 Plaintiff's allegations, if he prevails and establishes the requirements of California Civil
 10 Code section 3294, the punitive damages alone could exceed the jurisdictional
 11 minimum. "To assess the amount of punitive damages that is appropriate in a given
 12 case, the court considers the nature of the defendant's wrongdoing, the amount of
 13 compensatory damages, and the wealth of the particular defendant." *Am. Gen. Life &*
 14 *Accident Ins. Co. v. Findley*, 2013 U.S. Dist. LEXIS 41644, 48-49 (C.D. Cal. Mar. 15,
 15 2013). The potential punitive damage award against a defendant may alone satisfy the
 16 amount in controversy requirement. In *Aucina v. Amoco Oil Co.*, the defendant-
 17 employer established that the amount in controversy exceeded the jurisdictional
 18 minimum where the former employee asserted claims for lost wages, lost benefits,
 19 mental anguish, and punitive damages. The court noted the defendant was a Fortune
 20 500 Company and that [b]ecause the purpose of punitive damages is to capture a
 21 defendant's attention and deter others from similar conduct "the plaintiff's claim for
 22 punitive damages" might alone exceed the jurisdictional minimum. *Aucina*, 871 F.Supp.
 23 at 334.

24 29. As set forth in Paragraph 17, *supra*, Plaintiff's Prayer for Relief (at
 25 paragraph 7) seeks attorneys' fees. The Ninth Circuit recently held "a court must
 26 include future [post-removal] attorneys' fees recoverable by statute or contract when
 27 assessing whether the amount-in-controversy was met." *Fritsch v. Swift Transportation*
 28 *Company of Arizona, LLC*, 899 F.3d 785, 794 (9th Cir. 2018). The Court may take

judicial notice of attorneys' fee awards in similar cases. Cases in the Ninth Circuit firmly establish that statutory attorneys' fees will be included as a basis for determining the jurisdictional amount in controversy. *See Galt G/S*, 142 F.3d at 1155-56. Attorneys' fees are calculable beyond the time of removal. *Fritsch*, 899 F.3d at 794; *Simmons*, 209 F. Supp. 2d at 1035. In 2013, the Superior Court of Sacramento County awarded a single plaintiff \$367,378.50 in attorneys' fees under the Fair Employment and Housing Act on a claim for wrongful termination and discrimination. *Angel v. Sutter Health et al*, case number 2009-00055279. Similarly, in 2012 the Orange County Superior Court awarded a single plaintiff \$295,535.50 in attorneys' fees under the Fair Employment and Housing Act on a claim for discrimination and failure to accommodate. *Vargas v. City of Long Beach*, case number 30-2009-00126342.

30. As also set forth in Paragraph 17, *supra*, Plaintiff Prayer for Relief (at paragraph 2) seeks emotional distress damages. In *Hettick v. Federal Express Corporation*, Santa Clara County Superior Court case number 103-CV-010014, Hettick alleged a co-worker had an obsessive crush on her and sexually harassed her, management did not take sufficient action to stop the harassment, and Hettick was constructively discharged as a result. In 2005, a jury awarded Hettick \$200,000 in emotional distress damages. In *Jody Gardner Clanahan v. David Diaz*, USDC Eastern District of California case number 1:05-CV-796, Clanahan, a teacher, alleged sexual harassment by the vice principal and that the school district failed to investigate or take appropriate corrective action. In 2007, the jury awarded Clanahan \$350,000 in emotional distress damages against the school district.

31. Defendants deny the validity and merit of all of Plaintiff's claims, the legal theories upon which they are purportedly based, and the claims for monetary and other relief that flow from them. However, for purposes of removal only, and without conceding that Plaintiff is entitled to any damages or penalties, it is readily apparent that his aggregated claims establish an amount "in controversy" well in excess of the jurisdictional minimum of \$75,000.

VI. NOTICE OF REMOVAL TO COURT AND ADVERSE PARTY

32. Promptly after filing this Notice of Removal, Defendants will give written notice of this pleading to counsel for Plaintiff and will file a copy of this Notice with the Superior Court of the State of California for the County of Orange.

VII. CONCLUSION AND REQUESTED RELIEF

33. Because there is complete diversity of citizenship between Plaintiff and all Defendants and because the amount in controversy exceeds \$75,000, exclusive of interest and costs, Defendants pray that the Court remove this civil action from the Superior Court of the State of California, County of Orange, to the United States District Court for the Central District of California and proceed with this matter as if it had been originally filed herein.

Dated: May 20, 2022

CALL & JENSEN
A Professional Corporation
Julie R. Trotter
Mireya A.R. Llaurodo

By: /s/ Mireya A.R. Llaurodo
Mireya A.R. Llaurodo

Attorneys for Defendants Western Refining
Retail, LLC, 7-Eleven, Inc., and Speedway, LLC